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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a labor union may be held liable for a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981 solely because the union failed to make affirmative efforts to stop an employer's discrimination.

2. Whether, if a duty to make such efforts exists under Title VII or Section 1981, a union can be held liable for breach of that duty based on a finding that in filing grievances against the employer's alleged discriminatory actions, the union made the arguments (such as seniority) that it thought best calculated to win the grievances, but those arguments did not include an explicit allegation of race discrimination.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, hereby petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Third Circuit in *Goodman, et al. v. Lukens Steel Co. et al.*, C.A. Nos. 84-1478 and 84-1509, entered on November 13, 1985.[1]

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[1] In addition to the parties identified in the caption, Lukens Steel Company was a defendant in the district court and an appellant in the court of appeals. The company has filed a separate petition for certiorari on other issues. *Lukens Steel Co. v. Goodman, et al.*, No. 85-1645. Respondents also have filed a petition for certiorari on other issues. *Goodman, et al. v. Lukens Steel Co., et al.*, No. 85-1626.

OPINIONS BELOW

The district court's findings of fact and conclusions of law are reported at 580 F. Supp. 1114. They are reproduced in the Appendix to this petition as Appendix B (50a-148a). The permanent injunction issued by the district court is unreported. It is reproduced as Appendix E (155a-159a).

The opinion of the court of appeals is reported at 777 F.2d 113. It is reproduced as Appendix A (1a-49a).

JURISDICTION

The district court issued a permanent injunction against the unions. On appeal the court of appeals affirmed that injunction. (3a, 34a). The court of appeals' judgment was entered on November 13, 1985. Appendix F (160a-161a). Timely petitions for rehearing were denied on January 7, 1986. Appendices G and H (162a-167a). By order of Justice Brennan dated March 18, 1986, the time for petitioners to file this petition for certiorari was extended to and including June 6, 1986. Appendix K (170a).

The district court's subject-matter jurisdiction was based on 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 2000e-5(f)(3).

This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

In 1973, respondents commenced this employment discrimination lawsuit on behalf of a class of black employees at Lukens Steel Company, which is a specialty steel manufacturer located in Coatesville, Pennsylvania. Named as defendants were Lukens Steel Company ("the company") and petitioners—the United Steelworkers of America, AFL-CIO-CLC, and its local unions 1165 and 2295 (collectively referred to as "the unions"). The unions are the exclusive bargaining representative for all of the company's hourly-paid employees.

Respondents asserted a large number of claims against the company, challenging a wide variety of its employment practices. Against the unions, they asserted three classwide claims: that the seniority system had been

negotiated and maintained for a racially discriminatory purpose; that the unions had discriminated against black employees in the processing of grievances; and that the unions had "passively permit[ted] the employer to discriminate against black persons." Respondents also alleged that the unions had committed acts of individual discrimination against three of the seven named plaintiffs. As we will fully describe, the courts below ultimately dismissed as unproven all of the claims against the unions except the claim that they had "passively permit[ted] the employer to discriminate against black persons." The legal sufficiency of the holding on that claim is the subject of this petition for certiorari.

At trial, the undisputed evidence showed that the company, like most other industrial employers, had complete control over all hirings, promotions, terminations, and other employment decisions. The only limits on the company's exercise of that control were limits imposed by statute and such limits as the unions were able to obtain in collective bargaining. The unions' only power regarding the company's employment practices was to file grievances alleging that the company was in violation of some existing provision of the collective bargaining agreement, or to negotiate for new contract provisions.

The hourly workforce was about 25 percent black during the relevant time period.[2] Because the local unions consisted entirely of employees at Lukens, and all employees were required by contract to join the unions, the local unions' membership had the same racial proportions

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[2] The district court fixed 1967 as the beginning date for claims under Section 1981, and April 1971 as the beginning date for Title VII claims against the unions. (58a). The court of appeals modified those rulings, holding that the statute of limitations for Section 1981 claims was two years instead of six, and also shortening the period for Title VII claims against the unions, thus making June 1971 the beginning date for all claims against the unions (7a-15a, 28a).

as the hourly workforce.[3] The district court found that blacks had "actively participated" both in local union meetings and affairs and in "the negotiations leading to each of the pertinent collective bargaining agreements." (71a, 133a). Undisputed evidence also showed that black employees had regularly been elected to high union offices, had frequently served as chairman of the union grievance committee, and had consistently served as union grievance representatives.

The record contains a huge volume of undisputed evidence about the unions' efforts to obtain non-discriminatory treatment for black employees, both throughout the steel industry and specifically at Lukens. These efforts included continuous efforts by the unions, from the late 1950's into the 1970's, to negotiate changes from the original system, under which management retained the complete unilateral power to place employees in the operating departments where they would work for their entire careers, culminating in the current system, under which job openings are posted and employees bid for transfers based on their full plant seniority. The undisputed evidence shows that one of the unions' primary reasons for actively championing these transfer rights was to make it impossible for employers in the steel industry, including Lukens, to continue their historical practices of consigning black employees to particular departments because of race.

The undisputed evidence also shows that throughout the industry and at Lukens, the unions exerted major efforts, through negotiations and through grievances, to eliminate non-job-related tests that management used as

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[3] Because the company historically had consisted of more than one corporation, two local unions are present. (59a-60a). Local 1165 is very substantially larger than Local 2295; at trial Local 1165 had 2600 members, while Local 2295 had only 80. (133a). The percentage of black members was also higher for Local 1165 than for Local 2295. (*Id.*).

a criterion for certain transfers and promotions. A wealth of evidence, consisting of contemporaneous documents as well as undisputed testimony, establishes that as early as 1965 one of the unions' primary reasons for attempting to eliminate such tests was the belief that many written tests disqualify more black employees than whites and thus tend to keep black employees from fully enjoying the transfer opportunities that the unions had negotiated on their behalf.

The evidence also contained a large volume of testimony that it was the union's policy to oppose individual acts of discrimination that occurred at Lukens and to seek redress for the victims through grievances or otherwise. Some of respondents' witnesses complained that although grievances had been filed on their behalf in an effort to remedy company actions that they believed discriminatory, the unions had not included explicit allegations of racial discrimination in those grievances. Union officers—including some who were members of the plaintiff class—testified that it was sometimes better to base a grievance on a specific provision of the contract, such as the seniority clause, rather than on the contract's general non-discrimination clause. They testified without contradiction that in their experience the company was less willing to settle grievances that included allegations of discrimination, and that they were often more successful in getting what the grievant wanted—such as a promotion, or backpay—if they omitted the claim of racial discrimination when there was another clear contract provision that would provide full satisfaction of the grievance.

After the trial, the district court issued a lengthy opinion containing its findings of fact and conclusions of law. With respect to the respondents' claims against the company, the district court found that respondents had not proved discrimination against the class in a number of respects, including wages, promotions and transfers to

bargaining unit jobs other than craft jobs, and discipline and discharge of nonprobationary employees (72a, 81a, 101a). On the other hand, the district court found class-wide discrimination by the company in several other practices, including the use of tests that had a disparate impact on black employees and discharges of probationary employees (87a-90a, 103a, 146a-147a).

With respect to the unions, the district court rejected all of respondents' claims that the unions had committed acts of discrimination against black employees. The court found that no discriminatory motive had entered into the negotiation or maintenance of the seniority system, held that respondents had proved no pattern of discrimination in the unions' handling of grievances, and rejected each of the individual claims of union discrimination (70a-72a, 133a, 135a-137a, 148a). In addition, the district court found that the unions' representation of black employees in grievances had effectively remedied the instances of disparate treatment that occurred in the company's day-to-day decisions on work assignments, shift differentials, and overtime. (91a, 93a). Similarly, the court found that through grievances the unions had "adequately protected blacks covered by the collective bargaining agreement [*i.e.*, non-probationary employees] from discrimination in discharges." (101a).

The only claim on which the district court found union liability was the claim that the unions had "passively permit[ted] the employer to discriminate." The district court found liability on this claim because of "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (137a). The court based that conclusion on three subsidiary findings. The first of those findings was that the unions knew that the company discharged black probationary employees at a disproportionately higher rate than whites, but did not file grievances over those discharges because of "a uniform policy of not filing griev-

ances on behalf of probationary employees, for any reason." (137a). The second subsidiary finding was that "the unions did object to Lukens' use of tests of all kinds [but] never based their opposition on the assertion that the tests had racially disparate impact . . . ." (*Id.*)[4] The third of these subsidiary findings was that the unions had generally been "reluctant to assert racial discrimination as a basis for a grievance." (138a). The court credited union officers' testimony explaining that when a grievance could be soundly based on a specific contract provision, such as seniority, allegations of racial discrimination were not only unnecessary but at times were counter-productive, because the company tended to "get its back up" when discrimination was alleged, thus impeding successful resolution of the grievance. (138a). Nonetheless, the district court found that a more vigorous pursuit of discrimination claims "as such" in grievances "would have focused attention upon racial issues and compelled some change in racial attitudes." (138a).[5]

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[4] In briefing to the court of appeals, respondents effectively conceded that this finding must be interpreted to mean that the unions did not include a claim of racially disparate impact in their *grievances* against the tests. The undisputed evidence already discussed, *supra*, at 6, established that the unions had argued in *negotiations* at the industry level and in *negotiations* at Lukens that the tests adversely affected black employees, and Lukens definitely understood these arguments. (*See* 90a). It was also undisputed, however, that the unions had not included a disparate-impact theory in their grievances against the tests, because they had experienced complete success in grievances at other steel companies by filing grievances based on a contract provision that prohibited the use of any tests that were not job-related, without any need to prove also that the tests had disparate impact.

[5] The district court made two other findings regarding the union that were mooted by the court of appeals' decision. We mention them here for the sake of completeness. First, in regard to racial harassment, the district court gave one other reason for finding the unions' reason for not making express arguments of racial discrimination to be "unacceptable": that reliance on contract provisions other than the non-discrimination clause did not satisfactorily address instances of racial harassment, which might not

The legal theory on which the district court held that the unions were liable, based upon these findings of fail-

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violate any provision of the collective bargaining agreement other than the non-discrimination clause. (138a). On the basis of this factual finding alone, the district court held that the unions had violated Title VII and Section 1981 through "[t]oleration and tacit encouragement of racial harassment." (147a). This holding was related to the district court's extensive findings pertaining to *the company* (111a-120a), in which the district court held that in the period beginning in 1967 the company had tolerated racial harassment and "passive[ly] encourage[d] the belief that individual acts of racial discrimination would go unpunished." (119a-120a, 147a).

The court of appeals vacated the findings of liability for racial harassment in light of its ruling on the statute of limitations (*see* note 2, *supra*). The court of appeals could not determine from the findings whether racial harassment had occurred frequently enough within the new limitations period to be deemed a regular occurrence or only "a few isolated incidents." (14a-15a). Presumably because of the decision to vacate those findings, the court of appeals did not address in any way the district court's finding of union liability for failure to take what the court deemed adequate action against racial harassment. (*Compare* 24a *with* 138a). (The unions pointed out to the court of appeals that within the new limitations period —the nine years from June 1971 through the trial in mid-1980 —the record disclosed only nine incidents of alleged racial harassment that came to the unions' attention. The record showed that the unions took action (including the filing of grievances) to try to prevent further harassment or to obtain relief for the victims in seven of those nine incidents.)

Second, the district court included in its findings—as an example of failure by the unions to make arguments of racial discrimination in grievances—a finding that the unions should have challenged the company's initial assignments of newly hired employees as discriminatory. Although the district court acknowledged the undisputed fact that the non-discrimination clause did not apply to initial assignments (despite persistent union efforts to obtain a clause that would apply), the court held that the unions should have filed grievances challenging initial assignments based on an interpretation of the contract that was contrary to the undisputed testimony of the union official who had negotiated the contract provision in question. (138a-139a). The court of appeals, however, vacated the findings of liability for discrimination in initial assignments on the ground that there had never been a proper class representative on this issue. (15a-24a).

ure to include racial discrimination as an explicit ground for grievances, was succinctly stated as follows:

> [*M*]*ere union passivity* in the face of employer discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well.

(139a, emphasis added). The district court equated intentional "passivity" with the kind of intent that it recognized to be a necessary premise for liability under Section 1981. The court said:

> [T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) *and a union which, aware of racial discrimination against some of its members, fails to protect their interests.*

(139a-140a, emphasis added). The court went on to hold that if a union "intentionally avoids asserting discrimination claims," it is liable under both Title VII and Section 1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities." (139a-140a).

The court of appeals affirmed on the same legal theory. It accepted the "premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace." (25a). The court also concluded that the unions had a particular duty to assert claims of race discrimination in grievances. (26a). It said:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions *intentionally avoided asserting claims of discrimination.* In so doing, the unions violated the duty of fair representation owed to their members. . . . By shirking their responsibility for presenting grievances based on discrimination, the un-

> ions also violated the duty to enforce the collective bargaining agreement.

(*Id.*, emphasis added). Then, like the district court, the court of appeals equated *intentional discrimination* with an *intentional decision* not to allege discrimination in grievances against the company. The court stated:

> The deliberate choice not to process grievances [alleging discrimination] also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well.

(26a-27a). Accordingly, the court of appeals affirmed the district court's findings of union liability. (27a).[6]

REASONS FOR GRANTING THE PETITION

The unions in this case, like many other responsible labor unions, have voluntarily undertaken a wide range of efforts to prevent employer discrimination. Nonetheless, the decision below holds the unions liable to share in the consequences of the employer's wrongs because, in the court's view, the unions did not do enough to prevent or remedy those wrongs. This holding is grounded on a theory that labor unions have a legal duty, imposed by statute, to make affirmative efforts to prevent an independent entity over which the union has no control—an employer—from violating the law.

This decision is not based on any statutory provision that outlines such a duty. On the contrary, the court below purported to base its decision on section 703(c) of Title VII, which goes no further than directing unions

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[6] The consequence of this affirmance is not only the injunction that is the subject of this appeal. In addition, "Stage II" proceedings are currently pending in the district court to determine the monetary relief to be awarded to the class. Respondents have asserted that the class is entitled to several million dollars in backpay and damages.

not "to discriminate" and not "to cause or attempt to cause an employer to discriminate . . . ." The court below also purported to base this duty on 42 U.S.C. § 1981, which this Court has authoritatively construed to prohibit only intentional discrimination, and not to impose an affirmative obligation to protect employees from another party's discrimination. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 396-97 (1982).

The decision below merits plenary consideration by this Court for several reasons.

First, the primary issue presented by the decision below is a recurring problem that has produced decisions in almost every circuit—decisions, indeed, that are in conflict. The majority of the courts of appeals, like the court below, have announced that Title VII imposes an affirmative duty on unions to make efforts to prevent employer discrimination. They have done so, for the most part, without any apparent effort to reconcile their holdings with the contrary language of the statute. At least one court of appeals has adopted the opposite view, holding that a union's mere failure to protect employees from employer discrimination is not a basis for liability.

This Court has not previously offered any guidance on this issue, but the issue has enormous practical significance for unions. Even unions, like the ones in this case, that have voluntarily undertaken efforts to prevent employer discrimination find it difficult to conform their conduct to the duties imposed on them by these courts. No matter what efforts they undertake, if they fall short of complete success, the unions risk a judicial decision that they should have done more or should have tried a different tactic. One result of such a decision is that unions can be subject to staggering litigation costs and monetary liability for the consequences of the *employer's* wrong.

Of even greater consequence, the decision below seriously impinges on the national labor policy. Congress has

followed two different patterns in legislating with respect to employment rights. One pattern—the National Labor Relations Act—establishes a framework for the *process* of collective bargaining, a framework that leaves employers and unions to arrive at their own substantive agreements, without any governmental compulsion over the terms of those agreements. The other pattern—exemplified by Title VII and other employee-protective legislation—sets minimum standards for employment that are not dependent on a union's success in collective bargaining. Statutes in the latter category give employees individual rights which they can enforce on their own, or through government agencies. The decision below—and the decisions of the other courts that subscribe to the same theory—makes unions responsible for enforcing these independent statutory rights and in so doing interferes with the national labor policy of free collective bargaining.

To avoid liability under the decision below, unions must attach the highest priority to preventing or remedying employer discrimination. Yet the entire theory of the national policy for collective bargaining is that federal law does not dictate substantive bargaining priorities or results, but allows the parties to set their own bargaining agendas and reach their own agreements. Moreover, the decision below tells unions that in representing their members they must explicitly allege race discrimination in grievances, even if their judgment in good faith is that another strategy will produce a better result. The national labor policy is to the contrary; this Court has long held that proper functioning of the collective bargaining system requires that unions be given a wide range of discretion in representing their members, "subject always to complete good faith and honesty of purpose in the exercise of [that] discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Finally, to the extent that the decision below is based on Section 1981, it also conflicts with this Court's decision

in *General Building Contractors, supra.* Section 1981 does not create an affirmative duty to oppose someone else's discrimination. A failure to oppose such discrimination does not violate Section 1981 merely because the failure to act was the result of a deliberate decision.

Thus, the issues presented by this case are recurring ones that implicate matters of great importance to the proper functioning of the national system of labor relations. There is a conflict among the circuits as to how those issues should be resolved. Plenary consideration by this Court is fully warranted.

I. THE ISSUE UNDER TITLE VII

A. There is no doubt that, under Title VII, a union that engages in discriminatory conduct commits an unlawful employment practice. Such union liability is explicit in the statute, in Sections 703(c)(1) and (c)(2), which parallel the language of Sections 703(a)(1) and (a)(2), the sections which define unlawful practices by employers. Nor is there any doubt that a union is liable when it induces an employer to discriminate, or even attempts to do so. That ground for liability is also explicit in the statute, in Section 703(c)(3). The disputed question is whether a union can be held to violate Title VII simply because it fails to make affirmative efforts to keep an employer from discriminating.

The terms of the statute are quite explicit. When the issue is not a union's own discrimination but instead is the union's responsibility in relation to employer practices, the statutory standard is that the union may not "cause or attempt to cause an employer to discriminate." [7]

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[7] Section 703(c)(3). This language was taken *in haec verba* from Section 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(2). The latter section has never been understood to impose an obligation on unions affirmatively to prevent employers from discriminating within the meaning of the NLRA. *See, e.g., Glasser v. NLRB,* 395 F.2d 401, 406 (2d Cir. 1968); *NLRB v. Jarka Corp.,* 198 F.2d 618, 621 (3d Cir. 1952).

Despite this clear language, however, a majority of the courts of appeals in one context or another have announced that unions have a duty to take affirmative steps to *prevent* employer discrimination. The seminal case on this issue was Judge Skelly Wright's opinion for the D.C. Circuit in *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973). One court of appeals recently went so far as to hold that a union is liable if it fails to make "every reasonable effort" to ensure that the employer complied with Title VII. *Howard v. International Molders Union*, 779 F.2d 1546, 1552 (11th Cir. 1986), *petition for cert. filed*, No. 85-1629 (Apr. 4, 1986).[8] This Court has never given the

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[8] In addition, see *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55, 62-63 (E.D. Pa. 1977); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 667, 673-75 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975); *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 988-91 (W.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 652 (2d Cir. 1971).

The cases cited immediately above hold, as did the court below in this case, that unions are liable for failure to take action against an employer's discriminatory practices. At least five other Circuits have decided cases in which the facts would support union liability for direct participation in some act or practice of alleged discrimination, as for example, negotiating an unlawful contract provision, but those courts have explained their decisions based on the theory of liability for failure to make affirmative efforts to prevent discrimination. *E.g., Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980). In the decision below, the Third Circuit relied on several of these cases as support for imposing liability on unions that had not agreed to any unlawful contract provision or joined in any un-

lower courts any guidance on the issue,[9] and most of the

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lawful act but had merely failed to oppose the employer's discriminatory acts. (25a-26a).

[9] The only employment-discrimination case in this Court which even remotely touches on the question presented herein is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/or joined in" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284. The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

Id. at 285.

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, the court below construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. (26a). *See also Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981).

The only other decision of this Court that has any bearing on the Title VII questions presented here is *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In that case the court of appeals had held that unions have a duty to remedy employer discrimination "to the *fullest extent possible, by the most expedient and efficacious means*," *id.* at 59-60 (emphasis in original), and that a failure to fulfill this responsibility gave individual minor-

courts that have adopted the theory of the court below have done so without any apparent effort to reconcile their holdings with the language of Title VII.

A series of cases in the Seventh Circuit, however, has adopted a view contrary to that of the court below. First, in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), the plaintiffs sued the employer for maintaining a sexually discriminatory policy in regard to overtime. They sued the union as well, alleging a breach of the duty of fair representation, because the union "failed to protect the female members of the Company from said discriminatory policies and practices." 492 F.2d at 405. The court of appeals affirmed dismissal of the complaint against the unions, declaring: "*Mere failure by the Unions to protect female employees from discriminatory Corporation policies . . . is insufficient to establish liability.*" *Id.* (emphasis added).[10]

In a subsequent Title VII case, the Seventh Circuit again held that mere failure to oppose employer discrimination is not a basis for union liability. In *Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985), a group of women brought suit under Title VII, alleging that their employer maintained sex-segregated job classifications and discriminated against women in wages, train-

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ity employees the right to take concerted action against the employer without any restraint from the union's status as exclusive representative. *Id.* at 60. This Court reversed, holding that the policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Id.* at 69.

[10] A number of district courts have reached the same conclusion in Title VII and Section 1981 actions. *E.g., Ivey v. Western Electric Co.*, 23 F.E.P. 1012 (N.D. Ga. 1977); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976); *Ruckel v. Essex International, Inc*, 14 F.E.P. 403 (N.D. Ind. 1976); *Meadows v. Ford Motor Co.*, 6 F.E.P. 795 (W.D. Ky. 1973); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968). *See also Golden v. International Ass'n of Firefighters Local 55*, 633 F.2d 817, 820-21 (9th Cir. 1980).

ing, promotions, and other practices. They also sued their union under Title VII, alleging, among other things, that it had "discriminatorily failed to represent [them] by allowing Jewel to maintain its discriminatory policies." *Id.* at 860. The court of appeals held that the plaintiffs could not prevail on the claim of union failure to represent unless they proved that in allowing the employer's violation to go unrepaired, the union was "motivated by discriminatory animus." Id. at 868.[11] *See also Bugg v. Allied Industrial Workers Local 507*, 674 F.2d 595, 597-98 & n.5 (7th Cir. 1982), *appeal dismissed*, 459 U.S. 805 (1982).

The decision below cannot be reconciled with these Seventh Circuit decisions. The rule of the Seventh Circuit is that mere failure to protect employees from employer discrimination cannot be the basis for union liability unless the union acted out of a racially discrimina-

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[11] The Seventh Circuit's initial formulation of this rule is cast in terms of what a plaintiff must establish for a *prima facie* case; it is phrased as "some indication that the Union's actions were motivated by discriminatory animus." 773 F.2d at 868. Later references to what the plaintiffs would have to prove on remand make clear that the ultimate burden imposed on the plaintiffs is to prove discriminatory motivation. For example, the court observed that "the union is fairly implicated in the plaintiffs' Title VII claims if the plaintiffs can prove that the Union's failure . . . to protest the laying off of only women employees was discriminatorily motivated," *id.* at 869. The court added that the union would escape liability if such motivation were not proved. *Id.*

Neither of the Seventh Circuit's decisions, in *Williams* or *Babrocky*, precludes holding a union liable for anything it does based on a racially discriminatory motive, including a decision not to oppose some employer act or practice. Thus, if a union regularly opposes the employer's deviations from its seniority agreement but, because of racial animus, decides not to oppose the employer's decision to pass over a senior black employee and promote a white employee instead, there is no doubt that the union has violated Title VII. But it has done so because it made a discriminatory decision, not because of a mere failure to oppose the employer's discrimination.

tory motive. The Third Circuit holds that such a failure can be the basis of liability: "there is an affirmative duty on the part of the unions to combat discrimination in the workplace," and liability attaches even if the union had no racially discriminatory motive—indeed, " 'regardless of' its leadership's favorable disposition toward blacks." (25a).[12]

B. The Title VII issue presented by the decision below is also a very important one. That decision specifically dictates what labor unions must do in their dealing with employers, and it does so in a way that is fundamentally at odds with the national labor policy.

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[12] The Second Circuit may also reject the theory of union liability for merely failing to oppose an employer's discrimination. In *Philbrook v. Ansonia Bd. of Ed.*, 757 F.2d 476, 487 (2d Cir. 1985), a case in which plaintiff alleged failure to accommodate his religious observances, the court declared:

> Title VII places a duty on unions not "to cause or attempt to cause an employer to discriminate against an individual." 42 U.S.C. § 2000e-2(c)(3). We have stated previously that a union's liability depends on its "responsibility for the discrimination." *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

The proper standard for union liability, the court held, was that:

> the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

Id. at 487, *quoting from Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

The *Philbrook* case is presently pending before this Court, on writ of certiorari granted on the school board's petition. *Ansonia Bd. of Ed. v. Philbrook*, —— U.S. ——, 106 S. Ct. 848 (1986). That petition does not present any issue regarding the union's liability, as part from the basic question whether the plaintiff's religious observances had been reasonably accommodated.

Congress has followed two different patterns in legislating about employment conditions. In the National Labor Relations Act, it enacted a structure and a procedure for bargaining, leaving employers and unions to negotiate the substantive terms and conditions of employment that meet their particular needs. Under this statute, employees are directly dependent on unions to obtain contract provisions that set their wages, seniority rights, and most other terms of employment. Employees decide collectively, through their union, what protection they want, and the protection that the union can secure in bargaining is directly dependent on the collective economic strength of the employees compared to the economic strength of the employer. In a number of areas, however, Congress has concluded that it is necessary or appropriate for employees to enjoy particular protections regardless of their collective economic strength or their bargaining decisions or priorities. In those areas, Congress has enacted statutes directly establishing the necessary affirmative protections—statutes like the FLSA,[13] OSHA,[14] ERISA,[15] and Title VII. These statutes create "federal minimal employment standards" which are " 'independent of the collective bargaining process' " and that " 'devolve on [employees] as individual workers, not as members of a collective organization.' " *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 106 S.Ct. 2380, 2397 (1985).

Where employment rights exist only by virtue of collective bargaining, employees are dependent on their unions to enforce those rights. Because unions have the exclusive right to enforce such contractual rights, this Court has held that unions are subject to the duty of fair rep-

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[13] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[14] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[15] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

resentation, which obligates them to act fairly in exercising their enforcement responsibility. Where Congress has created independent statutory rights, however, it has not given unions the responsibility of enforcing those rights but instead has established governmental authorities or private causes of action (often with fee awards to prevailing plaintiffs) to do the enforcement job. The decision of the court below, and the decisions of the other courts that share its view, confuse these two patterns. These decisions make unions responsible for the enforcement of statutory rights—rights which individual employees are entitled to enforce on their own.[16] In so doing, these decisions substantially interfere with the collective bargaining process, as Congress intended it to function under the national labor policy.

The collective bargaining process established by the National Labor Relations Act is grounded on the fundamental fact that employers and unions are separate and autonomous entities—entities which "proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." *General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 394. In the absence of a collective bargaining agreement, under our labor system "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function . . . ." *Steelworkers v. Warrior & Gulf Co.*, 363

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[16] Because these rights "devolve on employees as individual workers and not as members of a collective organization," it is not part of a union's duty of fair representation to enforce these statutory rights. "[The] duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all the employees within the unit." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984). The duty does *not* extend to those areas in which the individual employee is entirely free to protect his own interests, including the enforcement of individual statutory rights. *E.g., Freeman v. Teamsters Local 135*, 746 F.2d 1316, 1321 (7th Cir. 1984). The contrary holding of the court below is also in conflict with this decision of the Seventh Circuit.

U.S. 574, 583 (1960). A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.

A union duty to take affirmative action to prevent employer discrimination thus dictates the substantive positions that the union must take in bargaining and in contract administration. This is contrary to the national labor policy. "The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become a party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, 106 S. Ct. 1395, 1401 (1986), because Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960). Indeed, "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The same principle applies to the union's activities in enforcing contract provisions. The union's duty of fair representation is built on the premise that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), because "union discretion is essential to the proper functioning of the collective-bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979). The duty recognizes that it is the union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). Thus, so long as a union arrives at its decisions on grievances "honestly, in good faith, and without hostility or arbitrary discrimination," the duty of fair representation is not offended regardless of the *substance* of the union's positions. As long as it avoids such prohibited motivations, the union can take a position that is "contrary to that of some individuals whom it represents" or that "support[s] the position of one group of employees against that of another." *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964).

The theory of the decision below and of the other courts that have reached a similar conclusion conflicts with this national labor policy on two levels. First, it injects governmental compulsion into the substantive result to be reached through bargaining, by imposing on each union an affirmative duty to obtain anti-discrimination contractual provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), the duty the court below has read into Title VII effectively fixes bargaining priorities for unions. Under the decision below

unions are compelled to subordinate other bargaining aims to the goal of securing contractual provisions that duplicate the protections already conferred by Title VII. This is true regardless of the other pressing problems that the represented group of employees may face—problems as to which there may be no direct statutory protection and as to which the employees are wholly dependent upon whatever contractual rights they can obtain by dint of their collective strength. Furthermore, the duty created by the court below exists regardless of the union's bargaining strength or lack thereof.

Imposing such a duty on a union and holding the union liable for an employer's wrongs unless a court finds that the union advanced all of the demands it was required to advance, pressed those demands with sufficient vigor, and made only reasonable compromises, can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic warfare. Such a requirement thus will defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver, supra,* 358 U.S. at 295.

On the second level, the decision below also conflicts with the national labor policy because when unions choose to oppose employer discrimination, the decision below refuses to allow them any discretion to decide what strategies are best calculated to achieve their goal. Unions are not allowed to decide that the best way to attack an employer's tests is through a grievance asserting they are not job-related; the decision below holds the unions liable for not arguing that the tests have a disparate impact. Unions are not allowed to decide that a grievance based on seniority is the best way to remedy a discriminatory action by management; the decision below holds the unions

liable for failing to allege that management had a discriminatory *motive* for breaching the seniority agreement. These holdings flatly deny the "union discretion [that] is essential to the proper functioning of the collective-bargaining system." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 51. Moreover, they do so despite the district court's findings that in regard to a number of employer practices, including work assignments, overtime, and discharges of nonprobationary employees, the grievances that the unions did file—based chiefly on contract provisions other than the non-discrimination clause—were effective in remedying the discriminatory actions that the company took. (*See* page 7, *supra*).

This Court previously has held that the congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975). *See also TWA v. Hardison*, 432 U.S. 63, 79 (1977). The category of cases in which a union has merely failed to make affirmative efforts to prevent employer discrimination would seem to be the last cases in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, Title VII rights "can form no part of the collective bargaining process," because to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 51. Title VII confers on each employee, as an individual, an indefeasible right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission,

which "is empowered . . . to prevent any person from engaging in any unlawful employment practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are majoritarian organizations, to serve as Congress' agent in enforcing the individual rights created by Title VII. It follows that nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below does. To safeguard the national labor policy—and to resolve the conflict among the circuits—the Court should issue a writ of certiorari.

II. THE ISSUE UNDER SECTION 1981

To the extent that the decision below is based on Section 1981, it is also in conflict with the principles stated by this Court in *General Building Contractors Ass'n v. Pennsylvania, supra.*

In *General Building Contractors* a group of employers agreed to hire only persons referred by a union-operated hiring hall. The union, acting on its own, discriminated against blacks in its referrals. No claim was made that the employers were guilty of discrimination, but the lower courts held the employers liable for the *union's* discrimination, concluding, in effect, that the employers had "a 'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392. This Court reversed.

The Court held first that Section 1981 is violated only by "purposeful discrimination," that is, by "racially motivated" actions, "blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing" black persons. 458 U.S. at 388, 391. The Court also held that the statute "does [not] impose an affirmative obligation to ensure that blacks enjoy [the] right" to be free from

discrimination, nor does it make defendants "the guarantors of workers' rights as against third parties who would infringe them." *Id.* at 396. The Court concluded its reasoning by observing that any such duty would be inconsistent with the requirement of intentional discrimination. The Court explained:

> It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof . . . that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites.

Id. at 396-97.

The decision below cannot be reconciled with these principles. The court below held that unions are liable under Section 1981 for failing to make affirmative efforts to stop the *employer's* discrimination. It held that this liability existed " 'regardless of' [the union] leadership's favorable disposition toward blacks." (25a). The court below did not require any finding that the unions' actions were racially motivated or that in this respect the unions treated black and white employees differently. Instead, like the district court, the court of appeals held that Section 1981's requirement of intentional *discrimination* was satisfied by a finding that the unions made intentional *decisions* not to assert arguments of racial discrimination in grievances or other complaints. (26a). But an intentional *decision* not to make affirmative efforts to stop another's discrimination does not, and cannot, substitute for what this Court required in *General Building Contractors*: it does not constitute either "purposeful discrimination" or "racially motivated" action. Where there is no duty to act, a deliberate decision not to act is not a statutory violation.[17]

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[17] Although the court of appeals used the phrase "finding of intentional discrimination" to refer to the district court's findings on Section 1981, it did so immediately after stating that a "deliber-

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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ate choice" not to assert claims of discrimination was itself discrimination. ("The deliberate choice not to process grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation.") (26a). Moreover, if there had been any finding that the unions acted out of racial motivation in deciding not to assert claims of discrimination "as such," or any finding that in doing so the unions had treated black and white employees differently, the court would have had no reason to engage in its lengthy discussion of liability for failing to make affirmative efforts against employer discrimination. A finding of racially motivated failure to represent, or of union difference in treatment based on race, would have supported a judgment of liability based on the well-established construction of both Title VII and Section 1981. There was no such finding in this case.